ORIGINAL

(2)

No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in holding that, on the facts of this case, there is a reasonable likelihood that disclosure of polygraph results would have led the defense to admissible and favorable evidence sufficient to have changed the result of this criminal trial?

2. Whether the Court of Appeals' judgment is correct for the additional reason that a prosecutor's knowing presentation of a witness who has failed a polygraph examination on central points of his testimony, without disclosing that fact to the defense, the court, or the jury, violates the Due Process Clause of the Fourteenth Amendment?

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No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
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v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION

Respondent Dwayne Earl Bartholomew respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals' decision in this case.

Pursuant to Rule 15.1, respondent adds the following corrections and supplement to the facts set out in the petition.

JURISDICTION

Respondent does not dispute Petitioner's statement regarding this Court's jurisdiction in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by Respondent, this case involves the following constitutional and statutory provisions:

The Sixth Amendment to the Constitution of the United States, which provides in part:

> In all criminal prosecutions the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Washington Criminal Rule 4.7(a), which provides, in part,

> (a) **Prosecutor's Obligations.**
> (1) Except as otherwise provided by protective order or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
> (i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;
> * * *
> (iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;
> * * *
> (3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate the defendant's guilt as to the offense charged.

COUNTERSTATEMENT OF THE CASE

As the Court of Appeals noted, from the outset of this case "Bartholomew's claims have revolved around a single, narrow issue: whether he had the requisite mens rea to be convicted of aggravated first degree murder under Washington law (which requires premeditation), or whether he could only have been convicted of simple first degree murder (for which a felony-murder theory is sufficient)." Bartholomew v. Wood, 34 F.3d 870, 871 (9th Cir. 1994). The nondisclosed, exculpatory polygraph results went to the credibility and motives to lie of the only direct witnesses who testified on that issue, Rodney Bartholomew and Tracy Dormady.

1. The Proceedings in State Court.

From the day of his arrest, Dwayne Bartholomew has admitted that he robbed the laundromat and shot the attendant, Paul Turner; but he claims the shooting was accidental. Dwayne has been consistent in describing what happened: He says he persuaded his brother Rodney, who was at the laundromat with his girlfriend Tracy Dormady, to help him get into the laundromat so he could rob it. Rodney asked the attendant to unlock the door so that he could use the bathroom. Dwayne followed Rodney into the laundromat and entered the bathroom when Rodney came out. Rodney was gone when Dwayne returned. Dwayne ordered the attendant to lie down on the floor. When Dwayne turned to take the money from the cash register, the gun went off. As he fled,

the gun fired a second time into a counter. Tr. Tr. 385-86, 396, 467-68[1]; see State v. Bartholomew, 98 Wn.2d 173, 177-180, 654 P.2d 1170 (1982), vacated 463 U.S. 1203 (1983), adhered to 101 Wn.2d 631, 683 P.2d 1079 (1984).

Rodney and Tracy were the state's key witnesses on the issue of premeditation. They said that Dwayne told them that he was going to rob the laundromat and leave no witnesses, and they left, frightened. Both denied that Rodney participated in the crime. Tr. Tr. 369, 385-386.

The prosecutor relied extensively on Rodney and Tracy's version of the events in his argument to the jury:

> He [Dwayne] told Rod, his brother, and he told Tracy he was going to rob the laundromat. Their immediate response to him was, "You'll never get away with it. You're crazy; you won't get away with this." What was his response? "I'm not going to leave any witnesses." That can only mean one thing.

Tr. Tr. 505-506.

> Now, his reaction after he is caught is to do his best to get back at Rod; to get back at Tracy; to involve them. But, ladies and gentlemen, it makes no sense that they would be involved in this.

Tr. Tr. 507.

> I submit that what happened here is precisely what Rod and Tracy said, up to the point that this man enters the store. He tells them he is going to rob the place. He tells them he is going to leave no witnesses. They

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[1] The full state trial transcript was made part of the record below. This Brief references testimony and argument at the original trial and sentencing as "Tr. Tr." Testimony at the resentencing hearing--which was only partly transcribed and submitted--is referenced "R. Tr." Testimony in the December 22, 1992 hearing before the District Court is referenced "H. Tr."

don't say anything because they're afraid of him, and obviously with good reason. As they leave, he is headed toward the door.

Tr. Tr. 508-509.

> [Consider] the testimony of Rod that he told him he was crazy, he wouldn't get away with it. The testimony of Rod that the defendant responded, he would leave no witnesses.

Tr. Tr. 523.

> Certainly it took some soul searching [to turn Dwayne in to the police]. Rodney told us he talked to one of his older brothers first. Only after that were the police called. He finally decided, brother or not, he had to come forward.

Tr. Tr. 524.

It was only after his conviction, that Dwayne's new defense counsel learned that Rodney and Tracy had been given polygraph tests at the request of the prosecutor, and that the police polygraph expert determined that Rodney's answers regarding his participation in the crime were deceptive.[2]

On appeal, the Supreme Court of Washington affirmed Dwayne's conviction but reversed the death sentence and remanded for a retrial of the penalty phase. State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982), vacated 463 U.S. 1203 (1983), adhered to 101 Wn.2d 631, 683 P.2d 1079 (1984). The reversal of the death sentence was based, in part, on the failure to disclose the

[2] Dwayne's appointed trial counsel, whom the District Court found failed to adequately investigate the case (Pet. App. B-4), withdrew shortly after the death sentencing verdict was returned.

polygraph results, which the Court held were admissible at sentencing.[3] State v. Bartholomew, 101 Wn.2d at 646.

A new penalty trial was conducted, see State v. Bartholomew, 104 Wn.2d 844, 710 P.2d 196 (1985), which resulted in the sentence of life imprisonment without the possibility of parole--the only alternative to the death sentence available to the jury under Washington law. At the penalty retrial, the defense argued, among other things, that there was doubt about the accuracy of the original verdict of premeditation, because of evidence the first jury had not heard. The most important new evidence was the results of the undisclosed polygraph examinations given to Rodney Bartholomew.[4]

The defense placed these results into evidence through the testimony of the polygrapher who administered the tests, Tacoma Police Officer Howard Lucas. Officer Lucas was trained as a polygrapher by the State of Washington Criminal Justice Training

[3] "We hold that polygraph examination results are admissible by the defense at the sentencing phase of capital cases, subject to certain restrictions [relating to the qualification of the examiner and conditions under which the test was given]." Bartholomew, 101 Wn.2d at 646.

[4] In addition to the polygraph results, the defense at the penalty retrial argued there was doubt about premeditation because of another fact the guilt-phase jury never heard: the State's most important piece of circumstantial evidence--the murder weapon--was disassembled when it was seized by the police, but was put together before it reached the crime lab for testing. See H. Tr. 39-40. That fact called into question the crime lab tests on the gun which were used at the original trial to counter Dwayne's testimony that the gun went off accidentally. Tr. Tr. 472.

Department. R. Tr. 303-4. He had administered over 2,000 polygraph examinations for the Tacoma Police Department. R. Tr. 306. He testified he had never found a subject to be deceptive and later learned he or she was truthful. R. Tr. 307.

Officer Lucas testified he examined Rodney Bartholomew on September 23, 1981--six weeks after Dwayne's arraignment. R. Tr. 308. The tests were directed at two relevant questions: whether Rodney had helped Dwayne with the robbery, and whether he was inside the laundromat at the same time as Dwayne. Officer Lucas said he tested Rodney on these points four times, and the results indicated strongly that Rodney was being deceptive in his negative answers: under a scoring system where +6 establishes truthfulness and -6 establishes deceit (and scores between those are inconclusive), Rodney's score was -13. R. Tr. 316.

On cross-examination, Officer Lucas rejected the suggestion that Rodney's score resulted from a general sense of guilt for not stopping his brother. R. Tr. 333, 340. He explained that he talks at length with the subject before administering the polygraph tests and establishes a baseline for the individual from which his or her reactions can be judged. R. Tr. 339-40. Only the reaction to the specific question is considered in determining whether an answer shows truthfulness or deceit. R. Tr. 349. He also testified that he asked Rodney Bartholomew to return for further testing, to determine whether Rodney was in

the Laundromat when the shots were fired. R. Tr. 323, 345. He said Rodney did not return as he asked, however. Ibid.[5]

The prosecution presented no evidence at the penalty retrial which contradicted Officer Lucas or which suggested that the results of his polygraph examinations were unreliable.

2. The Proceedings Below.

Because no hearing was held in state court on the claims that Dwayne Bartholomew's rights were violated by the nondisclosure of the polygraph and the ineffectiveness of his counsel, the District Court held an evidentiary hearing on those issues. Four witnesses were called at that hearing: Michael Johnson, the prosecutor at Respondent's[6] first trial; Murray Anderson, defense counsel for his trial; David Murdach, a Tacoma defense attorney, a former deputy prosecutor and an expert polygraph examiner; and Rodney Bartholomew, the Respondent's brother and the chief witness against him at his trial.

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[5] Officer Lucas testified the polygraph testing was inconclusive as to whether Tracy Dormady was being truthful in her answers to the two questions used in her polygraph exam. R. Tr. 321. Neither of those questions went to any dispute between Tracy's version of the events and Dwayne's, and Tracy was not asked whether Rodney had helped Dwayne with the robbery. R. Tr. 321. Officer Lucas made a notation that he thought Tracy was being truthful in her answers to the questions she was asked; but he said this was a personal impression, and was not based on the polygraph results themselves. R. Tr. 321.

[6] Mr. Bartholomew, Petitioner below, is here referred to as Respondent.

Prosecutor Johnson testified that the polygraph examinations were administered to Rodney Bartholomew and Tracy Dormady at his request. H. Tr. 16. He said he recalled being informed of the results of Rodney's test, but deliberately withheld it from the prosecutor's file, and the defense. H. Tr. 15-17, 33. Although he admitted he was familiar with Washington Criminal Rule 4.7, which obligates prosecutors to disclose all statements of witnesses and all reports of experts (H. Tr. 19-20), he said he felt justified in withholding these documents because polygraphs were inadmissible under Washington law. H. Tr. 33. Mr. Johnson said he had never reduced a charge based on a polygraph result, but "I think other people in the office have, yes." H. Tr. 30. He swore he believed he had informed his co-counsel, Ellsworth Connelly, of Rodney's test results, but could not explain why the record reflects that when the issue was first raised after the original trial Mr. Connelly told the court "There weren't any polygraphs ...." H. Tr. 32.

Defense counsel Murray Anderson said his approach to Rodney at trial was to suggest that he was involved in the crime and was helping the state to save himself (H. Tr. 49); but he was unaware that Rodney had failed the polygraph on this issue (H. Tr. 36).[7]

[7] Mr. Anderson testified that he thought he learned of the polygraphs while the jury was out, and he moved for their disclosure or a mistrial. H.Tr. 36, 52-58. The record reflects no such motion, however; and Mr. Anderson's recollection on this point was contrary to Mr. Johnson's testimony (R.Tr. 23) and the findings of the Washington Supreme Court. State v. Bartholomew, 98 Wn.2d at 180.

Mr. Anderson said he discussed plea bargaining in the case with Chief Deputy Ellsworth Connelly, who in turn discussed it with Prosecuting Attorney Don Herron, but they declined to reduce the charges. H. Tr. 52.

David Murdach gave testimony as an expert on polygraph examinations. Mr. Murdach testified that he had administered over 5,000 polygraph examinations himself, and that based on his experience and the literature, he believed the results of properly conducted polygraph examinations are nearly 99% accurate. H. Tr. 71. He said he had administered many polygraph tests in connection with criminal cases, in Pierce County and elsewhere, and had testified on a few occasions where the examinations were conducted by stipulation. H. Tr. 69. He said that polygraphs are considered "routinely," in Pierce County and elsewhere, with regard to charging and plea bargaining decisions (H. Tr. 75), and "I don't think I have ever been aware of a prosecutor not dismissing if the person passed a state exam and a private exam because obviously the thrust of the prosecutor's job is to get at the truth." H. Tr. 76.

The last witness called by the Respondent at the hearing below was Rodney Bartholomew. Rodney testified that he was actually given two sets of polygraph tests, coming back a second time because he was "under the influence of drugs" during the first examination. Tr. 85-86. Rodney denied that he was ever told of the test results, and he could not recall whether he had

been asked to return again after the last test, as Officer Lucas had testified he was. H. Tr. 85, 87.[8] Rodney also said he was never contacted by Dwayne's lawyer before the trial. H. Tr. 87. On cross examination, he said that his testimony at trial was the truth. H. Tr. 88.

The State called no witnesses and presented no evidence rebutting Mr. Murdach's expert opinions regarding the standards for defense of capital cases, or the reliability of polygraph results. H. Tr. 89.

The District Court denied relief. It held that Mr. Anderson's representation was deficient and the polygraph results should have been disclosed. Pet. App. B-4, 5. But it found there was an insufficient showing of prejudice from those denials to warrant issuance of the writ, which it said required "a finding of 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Pet. App. B-5, quoting Carlson v. Hong, 707 F.2d 367, 368 (9th Cir. 1983).

A panel of the Court of Appeals for the Ninth Circuit unanimously reversed on the nondisclosure issue, without reaching Mr. Bartholomew's ineffective assistance claim or his claim that the presentation of Rodney Bartholomew's testimony violated due process. Pet. App. A-12n.3. The panel opinion did not determine whether polygraph results showing a prosecution witness in a

[8] In a statement to defense counsel after Dwayne's trial, Rodney said he was asked to return after the polygraph examination, but did not.

criminal case to be lying were necessarily admissible. Pet. App. A-17. Instead, it based its judgment on the determination that the "likelihood that that disclosure of the polygraph results would have led to other admissible evidence undermining Rodney Bartholomew's or Tracy Dormady's credibility creates a reasonable probability that the jury would have convicted Dwayne Bartholomew of simple rather than aggravated first degree murder had the state disclosed those results." Pet. App. A-19. It accordingly ordered the District Court to issue a conditional writ requiring a retrial on the issue of premeditation, or a reduction in the degree of conviction. A-20.

A timely petition for rehearing and suggestion for rehearing en banc was filed by the Superintendent; it was unanimously denied, without any Circuit Judge requesting a vote on the en banc suggestion. See Appendix A. The Superintendent did not request a stay of the mandate, which then issued; and on January 13, 1995, the District Court issued the writ. Appendix B.

REASONS THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT PRESENT THE QUESTION PRESENTED IN THE PETITION.

The sole Question Presented in the petition is whether the Due Process Clause requires prosecutors "to disclose information that neither is admissible in evidence nor will lead to admissible evidence, if the information may affect the preparation or presentation of the defense." Petition at i.

Respondent does not believe this question is presented by the decision of the Court of Appeals below.

There was no question below that the prosecution was obligated to disclose the polygraph results. That obligation was plain from the Washington court rules, as both the Supreme Court of Washington and the District Court held. See Pet. App. B-4.

The Washington Supreme Court reversed Mr. Bartholomew's death sentence, in part, because the state failed to disclose the polygraph results, which it held were admissible at sentencing. State v. Bartholomew, 101 Wn.2d 631, 646, 683 P.2d 1076 (1984). Washington Criminal Rule 4.7(a)(3) provides for the discovery of all statements of witnesses, all reports of experts, and all "material or information ... which tends to negate defendant's guilt as to the offense charged." See page 2, above.

In light of these controlling state authorities, there has never been any doubt but that the state was required to disclose the results. The sole issue below was not the disclosure obligation, but the prejudice resulting from its breach. On that point, the Court of Appeals held: "Given the closeness of the issue of premeditation, the likelihood that disclosure of the polygraph results would have led to other admissible evidence undermining Rodney Bartholomew's and Tracy Dormady's credibility creates a reasonable probability that the jury would have convicted Dwayne Bartholomew of simple rather than aggravated

first degree murder had the state disclosed those results." Bartholomew v. Wood, 34 F.3d at 876 (emphasis added).

The Court of Appeals' holding was thus premised on an indisputable point of law and a finding of fact, both of which the petition would have this Court assume. All the Court of Appeals held is that the nondisclosure of information which is clearly subject to a disclosure obligation violates due process if there is a "likelihood that disclosure ... would have led to other admissible evidence" which would have created a reasonable probability of a different result. Pet. App. A-19. That holding is neither controversial nor cert.-worthy; and it does not present the question the petition asks this Court to decide.

II. THE CASES CITED BY PETITIONER DO NOT SHOW A CONFLICT AMONG JURISDICTIONS IN THE APPLICATION OF BRADY.

Petitioner asserts that, in six Circuits, disclosure under Brady is required only "of information that itself is admissible in evidence." Petition at 14. The cases cited by petitioner simply do not support this assertion.

A few of the cases the Petitioner cites--United States v. Ramos, 27 F.3d 65 (3d Cir. 1994), and United States v. Pedraza, 27 F.3d 1515 (10th Cir. 1994)--are wholly inapposite, because they involve situations in which no Brady evidence existed at all. Similarly, United States v. Bencs, 28 F.3d 555 (6th Cir. 1994), involves not nondisclosure, but a delay in handing over Jencks material. 28 F.3d at 560-61. The Bencs court correctly

held that a Brady violation could not be made out solely on the basis of such delay. Id. at 561.

Others of Petitioner's cases involve findings by the courts involved that evidence was not material, whether or not it was admissible. See United States v. DeLuna, 10 F.3d 1529 (10th Cir. 1993); United States v. Oxman, 740 F.2d 1298 (3rd Cir. 1984), vacated on other grounds, 473 U.S. 922 (1985); United States v. Hartmann, 958 F.2d 774, 790 (7th Cir. 1992); Blackmon v. Scott, 22 F.3d 560, 564-65 (5th Cir. 1994); Nelson v. Nagle, 995 F.2d 1549 (11th Cir. 1993). The Court of Appeals below held nothing inconsistent with these cases; it just recognized that evidence which is not itself admissible may nonetheless be material for Brady purposes, because it can lead to other, admissible evidence. See Pet. App. A-17. These cases say nothing about this question.

The closest the Petitioner has come to identifying a Circuit split is in dicta from Oxman and United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983), that admissibility is a prerequisite to materiality. But neither of these cases considered circumstances where the materiality of information lay in other evidence its disclosure would have led to. Ibid.; Oxman, 740 F.2d at 1311.

None of these cases involved the kind of situation to which the Court of Appeals' holding was limited: undisclosed evidence which, through not itself admissible at trial, likely lead to

admissible evidence strong enough to change the result. They thus do not establish the conflict among jurisdictions asserted by Petitioner.

As should be clear from the quotations Petitioner offers from previous Ninth Circuit law, particularly United States v. Kennedy, 890 F.2d 1056 (9th Cir. 1989), cert. denied, 494 U.S. 1008 (1990), the decision below was no departure from previous Ninth Circuit precedent, which recognized materiality from "evidence acquired through [disclosed] information...." 890 F.2d at 1059. The Petition itself cites a number of cases which have followed Kennedy in this respect: United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991); United States v. Oliver, 908 F.2d 260, 262 (8th Cir. 1990); United States v. Derr, 990 F.2d 1330, 1336 (D.C. Cir. 1993), again dispelling the idea that this rule is unprecedented or new. No doubt, that is why no Circuit judge called for a vote on the Petition for Rehearing En Banc.

The decision below was simply an application to an unusual and particularly egregious set of facts, of established due process principles. It makes no new law that calls for this Court's review.

III. THE COURT OF APPEALS' DECISION WAS CORRECT ON OTHER GROUNDS IT DID NOT REACH.

Because the Court of Appeals decided the writ must issue based on a violation of Brady v. Maryland, 373 U.S. 83 (1963), it did not reach Mr. Bartholomew's broader claim: that due process is violated by the presentation of testimony from a witness whom the prosecutor knows, but does not disclose, has failed a polygraph on his testimony. Cf. Napue v. Illinois, 360 U.S. 264 (1959).

The requirement that criminal prosecutors refrain from presenting false testimony is related to, but distinct from, their duty to disclose exculpatory evidence. See Giglio v. United States, 405 U.S. 150, 154 (1972); Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991).

A key difference between them is the test of prejudice. A conviction obtained by the knowing use of false or perjured testimony "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976) (emphasis added).

> [I]f it is established that the government knowingly permitted the introduction of false testimony reversal is "virtually automatic." United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), (citing Napue v. Illinois, 360 U.S. 264, 269 .... Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony the defendant would not have been convicted." Sanders, 863 F.2d at 226; see also United States v. Seijo, 514 F.2d 1357, 1364 (2d Cir. 1975) (the test "'is whether there was a

> significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'").

United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991).

Application of any of these tests would require reversal here. If Rodney Bartholomew and Tracy Dormady had not testified, the prosecution's case on premeditation would have been devastated. If they had admitted that Rodney had participated in the crime, their credibility would have been equally devastated. Their testimony was the centerpiece of the state's case, and any test which focuses on the effect of their testimony would have to conclude that, if their testimony was tainted, that taint surely infected the verdict.

The broader question presented by this case, therefore, is the extent to which the presentation of a witness who has failed a polygraph violates the principle of Napue v. Illinois, 360 U.S. at 272. Napue's rule cannot be avoided by "prosecutors ... consciously avoid[ing] recognizing the obvious--that is, that [their witness] was not telling the truth." United States v. Wallach, 935 F.2d at 457. If prosecutors could withhold exculpatory evidence "on a claim that they thought it unreliable, [the state could] refuse to produce any matter whatever helpful to the defense, thus setting Brady at nought." Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985). Due process is violated when testimony is presented that is false, even if it is not technically perjurious. Alcorta v. Texas, 355 U.S. 28, 31

(1957); Barbee v. Warden, 331 F.2d 842, 845 (4th Cir. 1964); Turner v. Ward, 321 F.2d 918, 920 (10th Cir. 1963).

This duty was not dependent on the admissibility of that evidence--just as a defense lawyer's duty not to present perjured testimony arises despite the clear inadmissibility at trial of testimony about any attorney-client conference in which the intent to commit perjury was revealed. See Nix v. Whiteside, 475 U.S. 157, 172 (1986).

Admissible or not, polygraph evidence is highly probative. That was the uncontradicted testimony of Officer Lucas and Mr. Murdach, and a fact recognized by many courts.

> [E]ven the most ardent detractors from the validity of polygraph evidence concede that a degree of reliability of 70% or higher for properly administered examinations. Further, a large portion of this 30% 'error' rate includes tests that yield inconclusive results--results that cannot fairly be described as 'erroneous.'

McMorris v. Israel, 643 F.2d 458, 461-62 (7th Cir. 1981) (footnotes omitted).

> Certainly, as noted by the Eighth Circuit, polygraph examinations are reliable enough to pass the usual threshold for 'relevant' evidence. United States v. Oliver, 525 F.2d 731, 737n.11 (8th Cir. 1975); Fed. R. Evid. 401. A similar judgment is implicit in this court's consistent rulings that district courts have discretion to admit polygraph results in a proper case. [citations omitted.]

Id. at 643 F.2d 462 n.9[9] Without some contrary evidence from

[9] The State of Washington holds polygraph results admissible by stipulation, State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982), and for a variety of limited legal purposes. See, e.g., O'Hartigan v. Department of Personnel, 48 Wn.2d 41, 821 P.2d 44 (1991); State ex rel. Taylor v. Reay, 61 Wn.App. 141, (continued...)

the state, the polygraph results compel the conclusion that Rodney's testimony, more probably than not, was false.

The appeal below did raise an important and novel legal issue: whether due process required the disclosure and admission of polygraph results showing a state's witness was lying, or some other remedy faithful to the Napue principle. Respondent submits that it does--that fundamental fairness does not permit the prosecution in a criminal case to put on evidence it has good reason to believe is perjured, without disclosing the reasons to doubt it. That principle, and this Court's recent overruling of Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923), in Daubert v. Merrell Dow, 113 S.Ct. 2786 (1983)--strongly supports an argument that such disclosure and admission is constitutionally required.

The Court of Appeals wisely did not reach that issue, but decided this case on the narrower, fact-specific ground discussed in part II, above. However, if this Court decides to grant review, it should consider this broader constitutional basis for upholding the Court of Appeals' judgment, as well.

[9](...continued) 810 P.2d 512 (1991); State v. Cherry, 63 Wn. App. 301, 810 P.2d 940 (1991); State v. Bartholomew, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 20 day of March, 1995.

Respectfully submitted,

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No. 94-1419

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TANA WOOD, Superintendent,

Petitioner,

v.

DWAYNE EARL BARTHOLOMEW,

Respondent.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies that on the 20th day of March, 1995, he deposited in the United States Mail, first class postage prepaid, a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis in this case, addressed to:

Thornton Wilson
Assistant Attorney General
Attorney General's Office
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

Timothy K. Ford
Attorney for Respondent

NOT FOR PUBLICATION

FILED

NOV 16 1994

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DWAYNE EARL BARTHOLOMEW, Petitioner-Appellant, v. TANA WOOD, Superintendent of the Washington State Penitentiary, Respondent-Appellee.	)	No. 93-35549 D.C. No. CV 91-5102RJB ORDER

Before: WRIGHT, TANG, and REINHARDT, Circuit Judges.

The panel has voted to deny appellees' petition for rehearing. Judge Wright makes no recommendation with reference to the suggestion for rehearing en banc. Judge Tang recommends rejection of the suggestion for rehearing en banc and Judge Reinhardt has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX A

AO 450 (Rev. 5/85) (Mod. 10/93) Judgment in a Civil Case o

United States District Court
WESTERN DISTRICT OF WASHINGTON

DWAYNE EARL BARTHOLOMEW,

vs.

TANA WOOD, Superintendent of the Washington State Penitentiary,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C91-5102RJB

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] **Decision by Court.** This action came to consideration before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The State of Washington shall afford Petitioner a new trial on the issue of premeditation within a reasonable period of time, or shall reduce his degree of conviction to simple first degree murder.

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BRUCE RIFKIN
Clerk

Caroline M Gonzalez
(By) Deputy Clerk

APPENDIX B

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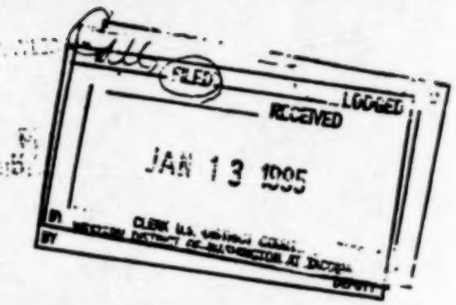

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DWAYNE EARL BARTHOLOMEW,

Petitioner,

v.

TANA WOOD, Superintendent of the Washington State Penitentiary,

Respondent.

CASE NO. C91-5102RJB

ALTERNATIVE WRIT OF HABEAS CORPUS

THIS MATTER comes before the court on the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit in *Bartholomew v. Wood*, 34 F.3d 870 (9th Cir. 1994) (CCA No. 93-35549), and on Petitioner's Request for Entry of Judgment.

In accord with the Judgment of the United States Court of Appeals for the Ninth Circuit, it is hereby

ORDERED as follows:

The State of Washington shall afford Petitioner a new trial on the issue of premeditation within a reasonable period of time, or shall reduce his degree of conviction to simple first degree murder.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 13 day of Jan, 19 95.

Robert J. Bryan
United States District Judge

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HAROLD H. GREEN
ESTER GREENFIELD
KEVIN LEDERMAN
KENNETH A. MacDONALD
FREDERICK L. NOLAND
FRANK H. RETMAN
DAVID M. "MAC" SHELTON
DANIEL HOYT SMITH
KATHLEEN WAREHAM

March 20, 1995

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Wood v. Bartholomew, No. 94-1419

Dear Mr. Suter:

Enclosed please find the Brief in Opposition in this case, a Motion to Proceed In Forma Pauperis, and a Certificate of Service.

Thank you.

Sincerely,

MacDONALD, HOAGUE & BAYLESS

Timothy K. Ford

TKF/ls
Enclosures

cc: Thornton Wilson
Dwayne Bartholomew